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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-154

RAYMOND E. WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in admitting into evidence a statement made by petitioner following his arrest, denying his motion for acquittal, and admitting hearsay evidence. Petitioner also contends that the prosecutor commented improperly on his failure to testify and that this case should be remanded to the district court for resentencing.

After a jury trial in the United States District Court for the District of Columbia, petitioner was

convicted of interstate travel to promote prostitution, in violation of 18 U.S.C. 1952.[1] He was sentenced to four years' imprisonment (Tr. 142-143). The court of appeals affirmed (Pet. App. 1a-2a).

During July of 1973, the government's chief witness, Cynthia Mundell, who was sixteen years old on the trial date, met petitioner at a Holiday Inn on Connecticut Avenue in the District of Columbia (Tr. 3-4). Petitioner took her to a bar where he confided that he was a pimp. After having sexual relations with Miss Mundell in her room, petitioner took her to a house and showed her "all these girls who he had working for him" (Tr. 6). Petitioner subsequently asked her to work for him as a prostitute, but she refused (Tr. 6-7). Eventually, however, Miss Mundell acquiesced and worked for petitioner as a prostitute until her arrest and subsequent return to Maple Glen correctional facility, from which she had escaped in July (Tr. 14, 20, 95).

On August 5, 1973, petitioner gave a party for a woman named Margie, one of his prostitutes (Tr. 18, 21). He took Miss Mundell from the District of Columbia to the party at his apartment in Alexandria, Virginia, and later took her back to the District to work for him as a prostitute (Tr. 21-22, 85, 94-95).[2] At the party petitioner bragged about his

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[1] Petitioner was tried on a six-count indictment; he was acquitted on the other charges.

[2] It was this interstate travel that underlay petitioner's conviction under 18 U.S.C. 1952.

"girls" and said that they were the best and made the most money (Tr. 22).

Sometime after this party, Miss Mundell attempted to run away from petitioner. Petitioner caught her at a bus station in the city, however, and punished her by beating her with a whip. Thereafter she lived with him and continued to work as one of his prostitutes (Tr. 23-25).

Agent Marsh of the Federal Bureau of Investigation testified that he arrested petitioner on September 6, 1973, following the return of the indictment in this case (Tr. 122, 133). Petitioner was advised of his constitutional rights at the scene of the arrest, and again at the Washington field office of the F.B.I. At the office petitioner read a card given to him which contained a description of an arrestee's constitutional rights. Petitioner was asked if he understood these rights and responded that he did. Petitioner refused to sign a waiver of his rights and said that he "didn't want to talk about it" (Tr. 125, 133).

Agent Marsh then asked petitioner several questions having no direct bearing on petitioner's offense, but instead relating to the whereabouts of certain other individuals (Tr. 125, 133). Petitioner responded voluntarily to these questions and described several locations where one Alton Hagler might be found (Tr. 125, 133). Marsh also asked petitioner if he knew where Tammy Black could be located, whether she worked for Hagler, and whether she might be with him. Petitioner replied that he knew where

she was, and that she worked for both Hagler and petitioner (Tr. 133-134).[3]

1. Petitioner contends that his statement about Tammy Black should not have been admitted in evidence.

a. Petitioner first contends that the statement was inadmissible because it was irrelevant and prejudicial (Pet. 9-11). Petitioner objected to admission of the statement on these grounds at trial (Tr. 125-126). However, he did not raise this issue before the court of appeals; accordingly, this question is not properly presented here. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

In any event, the statement was relevant. Petitioner correctly points out (Pet. 10-11) that the trial court was mistaken in concluding that Miss Mundell had testified that Tammy Black was one of petitioner's prostitutes and that the statement corroborated this testimony (Tr. 129). The statement was nevertheless relevant in that it corroborated Miss Mundell's testimony that petitioner had other prostitutes working for him. Indeed, defense counsel, in cross-examination of Miss Mundell, characterized the statement as a confession that petitioner "was pimping" (Tr. 137).

b. Petitioner also contends that the statement was unlawfully obtained because it was made after he

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[3] Hagler and Black had previously been arrested with petitioner on August 13, 1973 (Tr. 120-121, 135).

had refused to execute a waiver of rights form and stated that he did not wish to discuss the offense for which he had been arrested (Pet. 11-14). There is no dispute that petitioner was fully apprised of his rights and understood them.

At trial, the court conducted a hearing out of the presence of the jury when the government indicated that it intended to introduce a statement made by petitioner subsequent to his arrest (Tr. 119-130). The court concluded that petitioner made the statement voluntarily, "with full understanding of his rights" (Tr. 129), and petitioner at no time objected to admissibility on these grounds. His sole objection was that the statement was irrelevant. Petitioner's failure to offer this objection at trial forecloses review of this question in the absence of plain error constituting a manifest miscarriage of justice. *Gerberding* v. *United States*, 471 F.2d 55, 61 (C.A. 8); *United States* v. *Plount*, 452 F.2d 606 (C.A. 9). See also *United States* v. *Ackerson*, 502 F.2d 300, 303 (C.A. 8), vacated on other grounds, 419 U.S. 1099. The circumstances under which petitioner's statement was made belie any claim of fundamental error.

Petitioner has grounded his contention in this regard on his refusal to execute a waiver of rights form (Pet. 11-14). Contrary to his claim, however (Pet. 12), such a refusal does not necessarily constitute an invocation of the right to remain silent that precludes further questioning. See, *e.g.*, *United States* v. *Sawyer*, 504 F.2d 878 (C.A. 5); *United States* v. *Cooper*, 499 F.2d 1060, 1062-1064 (C.A.

D.C.); *United States* v. *Reynolds*, 496 F.2d 158, 162 (C.A. 6); *United States* v. *Ingram*, 477 F.2d 236, 240 (C.A. 7), certiorari denied, 414 U.S. 840; *United States* v. *McDaniel*, 463 F.2d 129, 135-136 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *Ellis*, 457 F.2d 1204, 1207 (C.A. 8); *United States* v. *Thompson*, 417 F.2d 196 (C.A. 4), certiorari denied, 396 U.S. 1047. However, petitioner not only refused to sign the waiver, but also stated that he did not wish to discuss the matter.

There is nothing in *Miranda* v. *Arizona*, 384 U.S. 436, that precludes all police contact with an arrested suspect once he has invoked his rights. *Smith* v. *United States*, 505 F.2d 824, 829 (C.A. 6). See also *United States* v. *Vasquez*, 476 F.2d 730, 732 (C.A. 5), certiorari denied, 414 U.S. 836. Here, the agent simply inquired whether petitioner knew where they might locate another individual with whom petitioner was known to be acquainted. Petitioner freely responded, offering several locations where Alton Hagler might be found. The agent then inquired whether Tammy Black would be likely to be found with Hagler and whether she worked for Hagler. Petitioner responded that she did, but went beyond the inquiry and volunteered that she also worked for him. This statement was not obtained by overbearing, artifice, or deceit. It was unsolicited and, as the district court found (Tr. 129), completely voluntary. Accordingly, it was admissible. *Anderson* v. *United States*, 399 F.2d 753, 755 (C.A. 10).

2. Petitioner's claim that the district court erred in denying his motion for judgment of acquittal (Pet. 17) is without merit. In ruling on a motion for judgment of acquittal, the trial judge must decide, on the basis of the evidence and the inferences therefrom viewed in the light most favorable to the government, whether a sufficient showing of a defendant's guilt has been made to send the case to the jury. See, *e.g.*, *United States* v. *Tager*, 481 F.2d 97, 100 (C.A. 10), certiorari denied, 415 U.S. 914; *United States* v. *McCall*, 460 F.2d 952, 955 (C.A. D.C.). The testimony of Miss Mundell, which the jury obviously believed, is plainly sufficient to support petitioner's conviction,[4] and it is not within the purview of this Court "to determine the credibility of witnesses." *Glasser* v. *United States*, 315 U.S. 60, 80.[5]

3. Petitioner also alleges that the district court should not have admitted testimony of Miss Mundell concerning a conversation among prostitutes who

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[4] We are unable to examine the sufficiency of the evidence in its entirety because only part of the trial was transcribed. See *Strangway* v. *United States*, 312 F.2d 283, 285 (C.A. 9), certiorari denied, 373 U.S. 903.

[5] Petitioner's other contentions in this regard, concerning testimony as to his prostitution activities and the fixing of certain dates (Pet. 17-18), were not presented to the courts below. Accordingly, these issues are not properly before this Court. *Adickes* v. *Kress & Co.*, *supra*; *Lawn* v. *United States*, *supra*.

worked for petitioner (Pet. 10).[6] A review of the record shows that, contrary to petitioner's contention (Pet. 19), no objection to this testimony was made (Tr. 22-23). Furthermore, petitioner's counsel re-emphasized the effect of this conversation when, upon cross-examination of Miss Mundell, he read from her grand jury testimony (Tr. 64). Finally, the effect of this testimony was not prejudicial. If the jury regarded it as noteworthy at all, it served merely to corroborate earlier testimony that petitioner was a procurer, and the witness's personal knowledge that other prostitutes worked for petitioner (Tr. 6-8, 15-19, 22-23, 50-51, 64, 78-79).

4. Petitioner argues that the following quotation from the writer Domingo Ortego in the prosecutor's closing argument was a comment on his failure to testify (Pet. 14):

> Bullfight critics ranked in rows crowd the enormous plaza full, but there is only one man there who knows and he is the man who fights the bull.

As petitioner notes, however, this comment, to which no objection was made, followed "the prosecutor's attempt to counteract defense counsel's" attack upon Miss Mundell's credibility (Pet. 14). In short, the quotation was intended to enhance the credibility of the government's chief witness, not to comment on

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[6] Miss Mundell testified as follows in this regard (Tr. 22-23):

> They were talking about other things, you know, the things they were talking about—the things Mickey [petitioner] was talking about, they were talking about different tricks they picked up, and things.

petitioner's failure to testify. Petitioner's belated speculation that the jury might have construed the quotation to refer to him is insufficient to make out a violation of his Fifth Amendment rights. See *United States* v. *White*, 444 F.2d 1274, 1278 (C.A. 5), certiorari denied, 404 U.S. 949; *United States* v. *Taitano*, 442 F.2d 467 (C.A. 9), certiorari denied, 404 U.S. 852.

5. Petitioner also claims that his sentence was premised on the trial court's consideration of a prior larceny conviction following a proceeding at which he had not been represented by counsel (Pet. 18). Except for petitioner's say-so, however, there is no indication that the district court "expressly took into consideration" this particular conviction among all those comprising petitioner's extensive criminal record (Tr. 140, 142). Moreover, there is no evidence of record that petitioner was indeed unrepresented by counsel in connection with this conviction. In any event, the facts petitioner seeks to establish for the first time in this Court, by way of counsel's affidavit, should be presented to the sentencing court on collateral attack. Review of the claim by this Court at this stage is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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